No. 88-1309

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

STATE OF MINNESOTA, *et al.*,
Cross-Petitioners,

v.

JANE HODGSON, *et al.*,
Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AND THE RUTHERFORD INSTITUTES OF MINNESOTA AND OHIO AS AMICI CURIAE IN SUPPORT OF CROSS-PETITIONERS

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INTEREST OF AMICI CURIAE

The Catholic League for Religious and Civil Rights is a non-profit voluntary association, national in membership, organized to promote good will and harmonious relations in the community, to combat all forms of religious prejudice and discrimination and to defend the rights and sanctity of each human life. One of the League's strongest interests has been the defense of parents' rights to direct the upbringing of their children.

The Rutherford Institute is a non-profit religious organization named for Samuel Rutherford, a seventeenth century Scottish rector dedicated to religious liberty. The

Rutherford Institute is composed of attorneys, judges, physicians, law students, educators and other citizens dedicated to the protection of religious liberty and other constitutional guarantees. With chapters in many states and its national office in Charlottesville, Virginia, the Rutherford Institute seeks to educate the public on vital issues confronting the religious community.

The Catholic League for Religious and Civil Rights and the Rutherford Institutes of Minnesota and Ohio are filing this brief in support of parental notification. No issue is more critical from a legal, theological or moral standpoint than the status of the unborn. Concomitant with this is the degree to which parental rights and the traditional family unit is to be conferred with and involved in the crisis of teenage pregnancy.

This brief will urge reversal of the Eighth Circuit Court of Appeals' decision only insofar as it upheld the district court's determination that a bypass procedure is constitutionally required as an alternative to parental notification. The Catholic League and the Rutherford Institutes of Minnesota and Ohio have obtained written permission to file this brief from counsel of record for the parties in this case. These letters have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The application of constitutional principles to the question of whether a state may require physicians to notify the parents of an unemancipated minor prior to performing an abortion on their daughter, without establishing a bypass procedure, necessitates reversal of that portion of the Eighth Circuit Court of Appeals' decision which affirmed a lower court's invalidation of Minn. Stat. Ann. §144.343 (2) (the pure notice provision). The Eighth Circuit summarily affirmed a lower court's ruling that a bypass procedure is constitutionally required as an alternative to parental notification. Since the Court of Appeals failed to adequately

explain its reasons for affirming the lower court's decision, perplexing constitutional issues remain unresolved.

By requiring that parents be notified before their daughters have an abortion, the State of Minnesota has demonstrated that it correctly perceives and supports parents' preeminent right to direct their children's upbringing. The Minnesota statute conforms with established tradition and prior decisions of this Court which have upheld the constitutionally protected right of parents to control the custody, care and education of their children. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Since the abortion decision raises profound moral and religious issues, *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622 (1979), parental consultation is particularly appropriate in any decision involving abortion. The "primary role" and "fundamental interest of parents, as contrasted with . . . the State, to guide the religious future and education of their children . . . is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

Generally, state regulation of abortion has been permissible to foster "compelling state interests" by "narrowly drawn" legislation. *Roe v. Wade* 410 U.S. 113, 155 (1973). However, in light of this Court's decision last term in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), states now enjoy greater latitude in regulating abortion.

Minnesota's legitimate interest in protecting the integrity of the family and the well-being of minors justifies the requirement of parental notification without an alternative bypass procedure, which is codified in Minn. Stat. Ann. §144.343 (2).

ARGUMENT

I. PARENTS HAVE A CONSTITUTIONALLY PROTECTED RIGHT TO CONTROL THE CARE, CUSTODY AND EDUCATION OF THEIR CHILDREN: THIS INCLUDES THE RIGHT TO BE INVOLVED IN THEIR MINOR CHILD'S DECISION IN A MATTER OF PROFOUND MORAL AND RELIGIOUS SIGNIFICANCE SUCH AS ABORTION.

A. Parents Have a Constitutionally Protected Right to Control the Care, Custody and Education of Their Children.

The right of parents to oversee the upbringing of their children is a tradition firmly rooted in constitutional jurisprudence. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). In describing the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment, this Court noted in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) that "it denotes not merely freedom from bodily restraint but also the right of the individual to contract and to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and *bring up children*. . . ." (emphasis added).

Numerous decisions of this Court have acknowledged and supported the traditional family structure, which places parents in a position of authority over their children. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Moore v. East Cleveland*, 431 U.S. 494 (1977); and *Quilloin v. Walcott*, 434 U.S. 246 (1978). In a long line of cases beginning with *Meyer, supra* and *Pierce v. Society of Sisters*, 268 U.S. 510, (1925), this Court has consistently affirmed parents' constitutionally protected rights in relation to their children. "The child is not

the mere creature of the State: those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535.

Parents' ability to provide a structured environment to facilitate their children's sound moral and psychological development depends in large measure on parents' capacity to assume leadership within the family; and the notion of effective leadership necessarily implies the exercise of authority. In *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622 (1979) Justice Powell stated that "central" to many of the theories which attempt to determine the most effective way for parents to help their children to achieve responsible adulthood and "deeply rooted in our nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children." 443 U.S. at 638 (plurality opinion).

While discussing "the affirmative process of teaching, guiding, and inspiring by precept and example" which "is essential to the growth of young people into mature, socially responsible citizens," Justice Powell noted that:

> We have believed in this country that this process, in large part, is beyond the competence of impersonal political institutions. Indeed, affirmative sponsorship of particular ethical, religious or political beliefs is something we expect the State not to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice. "Thus, [i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include *preparation for obligations the state can neither supply nor hinder*."

443 U.S. at 638, quoting *Prince v. Massachusetts*, 321 U.S. 166 (1944) (emphasis in original).

Writing for the majority in *Parnham v. J.R.*, 442 U.S. 584, 602 (1979), the same year that *Bellotti II* was decided, Chief Justice Warren Burger explained the policy considerations underlying this Court's adherence to the principle of parental dominion over their children:

> Our jurisprudence has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More importantly, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

(citations omitted).

Very clearly, the requirement imposed by Minnesota that parents be informed prior to their daughter's having an abortion is a reasonable and necessary legislative effort to ensure that parents' constitutionally protected rights will not be circumvented. Certainly notice of their children's activities is a minimum expectation of parents; and surely without such notice, parents are powerless to act in the best interests of their children or, in fact, to act at all.

B. Parental Consultation Is Particularly Important When Minors Seek An Abortion, a Decision Which Raises Issues of Profound Moral and Religious Significance.

Implicit in the concept of parental custody is the belief that parents are responsible for the health care of minor children. "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Parnham*, 442 U.S. at 603.

> [P]arental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long range consequences, a State reasonably may determine that parental consultation often is desirable and often in the best interest of the minor.

Bellotti II, 443 U.S. at 640 (plurality opinion).

The difficulties ordinarily encountered by minors seeking medical treatment are exacerbated by the extreme gravity of the abortion decision, which may result in both physical and psychological trauma. The stressful nature of the abortion decision and the need for parental consultation were noted by Justice Stewart in his concurring opinion in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976):

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried, pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.

428 U.S. at 91 (Stewart, J., concurring).

Justice Stevens recently described the abortion decision as "a difficult choice having serious and personal consequences of major importance to [the women's] own future — perhaps to the salvation of her immortal soul." *Thornburgh v. American*

College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (Stevens, J., concurring).

By involving parents in the abortion decision, Minnesota invokes established wisdom which holds parents responsible for the moral upbringing of their children. Involvement in the crucial moral decisions of their children's lives is essential if parents are to effectively discharge their duty. If parents fail in this effort, successive generations of individuals lacking the ability to make morally coherent decisions may well be the norm for the future.

In *Moore v. East Cleveland*, 431 U.S. 494 (1977) this Court discussed the preeminent position of the family in society and noted the family's traditional function as guardian of the nation's moral and cultural heritage. "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." 431 U.S. at 503-04. (plurality opinion).

Commenting on this passage, Justice Powell observed that "the unique role in our society of the family requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children." *Bellotti II*, 443 U.S. at 634.

Minors need their parents' protection and guidance in order to successfully achieve the degree of moral and emotional development necessary to withstand the vicissitudes of modern life and to become contributing members of society. Parents have a corresponding responsibility to provide religious and moral direction through example, teaching and discussion. "The duty to prepare the child for 'additional obligations' . . .must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

The family's ability to carry out its vital functions is jeopardized, if not vitiated completely, when parents are kept in a conspiracy of silence, unaware of the moral dilemmas with which their children struggle. Children's unique position in society has been recognized by this Court. "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children." *May v. Anderson*, 345 U.S. 528, 536 (1933) (Frankfurter, J., concurring). The Minnesota legislature has acted properly and responsibly to ensure that minors contemplating the wrenching decision of whether to have an abortion will have an opportunity to resolve this crisis within the protective framework of the family.

Because the abortion decision is fraught with so many enduring consequences not readily apparent to adolescents, and because it has far-reaching moral implications, the absence of parental guidance at this critical time is tragic — for the children, the parents and the family.

II. BECAUSE OF THIS COURT'S DECISION IN *WEBSTER V. REPRODUCTIVE HEALTH SERVICES*, STATES NOW ENJOY GREATER LATITUDE IN REGULATING ABORTION.

This Court has never ruled on the question of whether a judicial bypass procedure is constitutionally required as an alternative to parental notification. In light of last term's decision in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), it is clear that states now enjoy greater latitude than before in regulating abortion. In *Webster*, this Court upheld various provisions of a Missouri statute which placed certain limitations on women's abortion decisions. Chief Justice Rehnquist, writing for the plurality, noted that "[t]here is no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited under the language of cases such as *Collautti v.*

Franklin, 439 U.S. 379 (1979) and *Akron v. Akron Center for Reproductive Health, Inc., supra.*" 109 S.Ct. at 3058. (citation omitted in original.)

Although this Court has determined that a minor's decision to have an abortion may not be subject to a third party's absolute veto (*Danforth*), it has also expressly declined to equate notice requirements with consent requirements. *H.L. v. Matheson*, 450 U.S. 398, 410 (1981) (n.17 quoting *Bellotti II*, 443 U.S. at 640.) Justice Stevens has observed that "[n]either *Danforth* nor this case determines the constitutionality of a statute which does no more than require notice to parents, without affording them or any other third party an absolute veto." 443 U.S. at 654, n.1 (Stevens, J., concurring).

The *Matheson* Court considered the constitutionality of a Utah statute which required parental notice. It held that although the appellant lacked standing to challenge the statute on its face, the statute was constitutional as applied to an unemancipated girl who had made no claim regarding either her maturity or her relationship with her parents. In ruling that the statute was constitutionally sound, this Court expressed its approval of parental consultation regarding the abortion decision:

> As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor.

450 U.S. at 409 (quoting *Bellotti II*, 443 U.S. at 640).

Cross-Respondents below assert that a minor's right to privacy based on *Roe v. Wade*, 410 U.S. 113 (1973) is infringed by Minnesota's parental notification statute. However, as Justice Stevens has noted:

> [T]he holding in *Roe v. Wade* (citations omitted) that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision.

Danforth, 428 U.S. at 102 (Stevens, J., concurring and dissenting).

Justice Stevens has observed that "[t]he State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible." *Id.*

Justice Powell has described the proper relationship between competing interests when parents' rights to direct their children's upbringing conflict with rights claimed by children who wish to assert their autonomy:

> Properly understood, then, the traditional parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.

Bellotti II, 443 U.S. at 638 (plurality opinion)(footnote omitted).

The important considerations articulated by Justice Powell are reflected in Minnesota's requirement of parental notification. This legislation fosters two substantial state interests: it supports the integrity of the family by recognizing

parental authority and it protects children in crisis by providing them with an opportunity for parental consultation.

A requirement of parental notice without a judicial bypass procedure as an alternative does not give any third party a veto over a minor's decision to have an abortion. It merely allows parents to know in advance of their daughter's intentions. The privacy-based constitutional right of parents to direct their children's upbringing deserves vigilant protection. Minnesota's legitimate concern with preserving the integrity of the family and protecting minors justifies enactment of a parental notification statute without a judicial bypass procedure.

CONCLUSION

Minn. Stat. Ann. §144.343 (2) (the pure notice provision) which requires physicians to notify parents of an unemancipated minor under the age of 18, at least 48 hours prior to performing an abortion on their daughter comports with constitutional standards previously articulated by this Court. That portion of the decision of the Eighth Circuit Court of Appeals which upheld the district court's ruling that a bypass procedure is constitutionally required as an alternative to parental notification should be reversed.

Respectfully submitted,

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